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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAT THANH LAM

Defendant and Appellant.

G041303

(Super. Ct. No. 06HF1005)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick H. Donahue, Judge. Affirmed.

Stephen S. Buckley and Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

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THE COURT:^{*}

The only issue in this appeal is whether the trial court failed to stay the sentencing under Penal Code section 654.¹ Defendant complains the court improperly failed to stay the sentences imposed as to count 2; (the attempted second-degree robbery of Mohammed Yaqub); count 3, (the assault with a firearm on Yaqub); count 5, (the attempted second-degree robbery of Michael Bogue); and count 7, (the attempted second-degree robbery of John Debrum) under section 654. He also argues solely for the purpose of preserving his right to federal review that the court improperly imposed the upper term of eight years for count 1. We conclude the court correctly sentenced defendant and affirm the judgment.

I

Facts and Proceedings

Defendant Dat Thanh Lam was charged with kidnapping to commit robbery (count 1); attempted second degree robbery (counts 2, 4, 5, 7, and 9); and assault with a firearm (counts 3, 5, 6, and 8). Arming enhancements and the allegation he had served a prior prison term were also alleged.

The jury convicted him of counts 2 through 9, and found him guilty of the lesser included offense of simple kidnapping. The jury found true the arming enhancements, and the court dismissed the prior prison term allegation.

In November of 2008, he was sentenced to a total term of 17 years.

* Before Sills, P.J., Rylaarsdam, J., and Moore, J.

¹ All statutory references are to the Penal Code unless otherwise stated.

The Robbery of Dane-Elec on September 30, 2003

On September 30, 2003, Mohammed Yaqub “Yaqub” the accounting controller of Dane-Elec, a small Irvine company responsible for producing and distributing computer memory sticks, was working along with several other company employees to perform a quarterly inventory of product worth between seven and eight million dollars.

Around 6:45 p.m., Yaqub exited the corporate office space to use a restroom located in the public portion of the building where the company was located. Three or four men wearing masks and hats suddenly surrounded him. Two of the men were wearing latex gloves, and were carrying guns. The men spoke Vietnamese to each other.

One of the intruders put a gun to Yaqub’s chest, and a second person told him to cooperate or he would be shot. They turned him around and pointed a gun in his back. They immediately asked him how many people were inside the Dane-Elec spaces. Yaqub who was very frightened and disoriented responded there were two people inside, although there were actually seven employees working inside of the office at the time.

The assailants ordered him to open both the outer and inner locked company doors with his swipe card. After they forced him through both of the doors, they walked him through the facility towards the production area where they made him lay down on the floor, and then zip tied his hands and ankles. After he was lying down on the floor, one of the men kicked him several times on the side of his body. Later, one of the men told him they did not mean to hurt him.

Dane-Elec employees Isaac Moses and Wayne Menke were packaging materials near where Yaqub was placed on the floor. The assailants secured both of them with zip ties, and then placed them on the floor next to Yaqub.

Dane-Elec employee John Debrum was standing in the stock room when he felt a man behind him put a gun to his head. The man then told him to get down on the floor. Debrum who thought one of his colleagues was playing a joke tried to wrestle the gun away. Another assailant hit him in the face with a gun. Debrum tried to run away. The men chased him yelling “stop” and “shoot him.” Debrum was caught, and wrestled to the floor where his hands and ankles were zip tied.

While Debrum was being wrestled down to the floor, another employee Mike Bogue unexpectedly walked in on the fray, and was also told to get down on the ground. Bogue refused, and began to struggle with his assailant. The particular assailant, who was struggling with Debrum at the time, shot at the wall and told Bogue to get down on the floor. Bogue complied. The assailants zip tied Bogue’s hands and ankles.

The assailants asked Bogue where the security cameras were located. He told them they were located upstairs. Shortly thereafter, two intruders untied Debrum’s and Bogue’s ankles to enable them to walk them back to the production area where Yaquib, Moses and Menke were restrained and lying down on the floor.

The intruders then asked the group of Dane-Elec employees about where the inventory was located, and whether there were still more people in the building. Debrum, who earlier had spotted another employee running away, told them that two employees had gotten away.² The intruders then spoke into a walkie talkie in a panicked manner. They told their victims to keep their faces down. They left immediately before they could take anything. Shortly thereafter, the victims arose from the floor, and Yakub called 9-1-1 on his cell phone.

² Dane-Elec shipping manager Ota Kisino had seen one of the intruders through an open door to the production area after leaving the company warehouse. When the intruder pointed a gun at Kisino and ordered him to lie on the floor, Kisino ran toward the back exit of the building. As he ran, he yelled to fellow warehouse employee, manager Mostafa Matin to follow him out of the building. Matin phoned 9-1-1 on his cell phone after following Kisino out of the building.

The next day, a janitor found a working Tec 9 pistol in a computer recycling bin. An expended round recovered from the warehouse wall matched the weapon. Defendant's DNA was found on a piece of latex glove found stuck inside of the weapon, and his DNA was also found on a walkie talkie battery pack which had been left at the scene.

When defendant was interviewed by the police he denied ever having been in Irvine, and said he did not know where Irvine was located. He denied wearing latex gloves, but later said he had worn them while working construction.

II

Discussion

A. The Trial Court Did Not Err in Imposing Separate Consecutive Sentences as to Counts 2, 3, 5, and 7.

The trial court here found that section 654 did not apply. In sentencing defendant the court stated “[P]eople were basically brought into this building with guns pointed at them. At one point in time a gun was fired and a bullet was shot into the wall . . . And the court believes that based upon the factual situation that the court heard that all these counts are separate and distinct counts; that none of them 654 with one another. And that is based upon the evidence that the court heard at trial.”

Section 654 “precludes multiple punishments for a single act or indivisible course of conduct.” (*People v. Hester*, (2000) 22 Cal.4th at 290, 294.) In reviewing a trial court’s sentencing decision, we give deference to the trial court’s factual findings. ““The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant’s intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the

evidence presented at trial.’ [Citation.]” (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.)

To determine whether a course of conduct is indivisible, courts consider the intent and objective of the defendant. If all of the criminal acts were incident to a single criminal objective, then the court may impose punishment only as to one of the offenses committed. (*People v. Beamon* (1973) 8 Cal.3d 625, 636-637.) On the other hand, if the evidence discloses a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct. (*People v. Perez* (1979) 23 Cal.3d 545, 551-552; *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.) Applying these principles, we turn to defendant’s arguments.

Defendant argues that counts 2 and 3 should have been stayed pursuant to section 654. Defendant contends that the three counts relating to Yakub, or kidnapping (count 1); attempted second-degree robbery (count 2), and assault with a firearm (count 3) were all part of a continuous course of conduct related to one objective, the robbery of Dane-Elec. Because the assault and the kidnapping were committed in furtherance of the attempted robbery, and because the kidnapping count carried the greatest range of punishment, counts 2 and 3 should have been stayed.

Defendant also contends as to counts 5 and 7 which involved the attempted second-degree robberies of Bogue and Debrum, that these counts too should have been stayed because they were committed solely in furtherance of the attempted robbery of Dane-Elec.

In support of his contention, defendant points to the fact that he was convicted of assaulting Bogue and Debrum with a firearm in counts 6 and 8. These assaults formed the basis of the force necessary to subdue both men, which in turn facilitated the sole objective of these crimes, which was the robbery of the Dane-Elec

facility. Counts 5 and 7 should have been stayed because defendant was sentenced for assaulting Bogue and Debrum with a firearm, and these counts carried the greater range of punishment.³

The People argue that the counts for which defendant was convicted involving Yaqub, constitute separate and discrete criminal motives. The People contend that the court could have reasonably concluded defendant held independent criminal objectives when assaulting Yaqub with a firearm, kidnapping him, and later attempting to rob him, particularly once the jury had acquitted him of kidnapping Yaqub to commit robbery, and instead convicted him of simple kidnapping. We are in accord.

There was ample evidence upon which the court below could find that the intruders assaulted Yaqub when they pushed a gun into his chest outside the Dane-Elec spaces, and again by pressing a gun into his back after turning him around so that they could specifically gain entry to Dane-Elec. After Yaqub was forced to open the outside doorway with his swipe card, he was then kidnapped where he was forced to open a second doorway, moved away from the exits, and then thrust through the facility to an inner or production area, where two other employees, Moses and Menke were encountered packaging materials.

The jury also convicted defendant of the attempted second-degree robbery of Menke (count 4.) A reasonable interpretation of the facts is that the second-degree robbery of Yakub occurred when the intruders encountered Moses and Menke, and the three men were zip-tied and placed on the floor. Thus, from these facts, we conclude there was substantial evidence for the trial court to find the intruders entertained separate and independent criminal objectives regarding counts 2 and 3.

³ Trial counsel did not object to the court's sentencing scheme pursuant to section 654. However, a section 654 claim is not waived by failing to raise it in the trial court, unless sentence is imposed pursuant to a plea bargain. (*People v. Hester, supra*, 22 Cal.4th at p. 295; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268, fn. 2.)

The court could also have reasonably found through substantial evidence that the intruders entertained independent criminal motives when they assaulted Debrum and Bogue with a firearm (counts 6 and 8), and when they attempted to rob them (counts 5 and 7.)

Significantly, the robbers did not intend to find more than two employees inside of the building because Yakub initially told them there were two employees left in the company space. Thus, once Yakub, Moses and Menke were secured inside of the building, the robbers did not expect to find any more persons inside, and the existence of Debrum and Bogue in the stockroom came as a surprise to them. The intruders' lack of knowledge regarding how many people were in the building was further amplified by the fact they asked their victims whether any other more employees still remained.

As to Debrum and Bogue, the court could reasonably find the intruders did not expect to find them there and thus entertained independent objectives by first assaulting, and then robbing them. Debrum and Bogue were not moved into the production area where the other victims were located until after they were initially secured with zip-ties. The intruders could have decided to rob them for the separate purpose of perpetuating the on-going robberies of Yakub, Moses, and Menke who were lying on the floor in the production area, as well as for the purpose of avoiding apprehension as to these robberies.

The bottom line is the intruders came to rob Dane-Elec, but were presented with many unknown and unanticipated events that had to be dealt with as they arose. The intruders' lack of knowledge regarding who was there, and what might happen, was tellingly evidenced by the fact that once Debrum informed them that two employees had earlier escaped, the assailants panicked and ran off. Thus, while the intruders' primary objective may have been to rob Dane-Elec, circumstances forced them to deal with many twists and turns along the way.

Thus we conclude substantial evidence supports the court's decision not to stay counts 2, 3, 5, and 7 pursuant to section 654.

The Court Did Not Err in Imposing an Upper Term Sentence as to Count 1

Lastly, defendant argues the court violated his federal constitutional rights when it used facts not found true by a jury beyond a reasonable doubt to impose the upper term of eight years for his kidnapping conviction in count 1. Defendant contends the court used facts not found true by a jury beyond a reasonable doubt, i.e., that it relied on his violent conduct indicating a serious degree of danger to society, and it relied on his prior convictions of increasing seriousness in imposing the upper term. Defendant further argues that the application of the determinate sentencing law to his case violates the ban against ex post facto laws (U.S. Const., art. 1, 9; Cal.Const., art. I, 9.)

Defendant raises these issues solely to preserve his right to federal review. Countless courts have previously rejected these issues, and so do we. (*People v. Black* (2007) 41 Cal.4th 799, 812-820; *People v. Sandoval* (2007) 41 Cal.4th 825, 844; 853-858, and Penal Code section 1170.1.

III

Disposition

The judgment of conviction is affirmed.